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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 385

ADDISON MILLER, INC., AND FIELDING & SHEPLEY, INC.,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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SUPREME COURT OF THE UNITED STATES

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No. 385

ADDISON MILLER, INC., AND FIELDING & SHEPLEY, INC.,

Petitioners,

vs.

THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved

This suit for damages for breach of contract was brought pursuant to a Special Jurisdictional Act of July 23, 1937 (C. 520, 50 Stat. 533, 28 U. S. C. Sec. 250(b) in Supp.). The principal difference between bringing this suit under the Special Act rather than under the general jurisdiction of the Court of Claims was that the Special Act eliminated some technical defenses.

The contract in suit was entered into on April 4, 1935, for the construction of a spillway gate structure for the Fort Peck Dam on the Missouri River in Montana. The questions here involved arose from labor clauses of the contract providing as follows:

(1) Government supplied workers were required to be "qualified workers" meaning "qualified to perform the work to which the employment relates."

(2) Petitioners were entitled to employ their own labor when qualified Government supplied workers were not "available".

(3) Petitioners were entitled to select and choose among Government supplied workers and to exercise normal control over their personnel.

The National Reemployment Service, through which petitioners were required to obtain Government supplied labor, had a rule permitting the employment of petitioners' own men when the Government failed to furnish labor within 48 hours after the time it was requested.

Petitioners claim breaches of the contract labor clauses as supplemented by the National Reemployment Service's 48 hour rule, in that, the Government (1) supplied unqualified labor, (2) prevented petitioners from hiring their own labor during the Government's delays in excess of 48 hours and up to 18 days in supplying labor late, and in excess of 48 hours and up to 16 days, although it was unable to supply requested labor, in ascertaining that its sources of supply were exhausted, and (3) required that no Government supplied worker be refused employment, or discharged without its approval as to his lack of qualifications or be demoted below his referral classification.

Petitioners contend for their excess costs resulting from these breaches of contract and arising out of the Govern-

ment's failure to supply qualified labor under the labor clauses of the contract, recovery of such excess costs having been provided for by the aforementioned Act of Congress of July 23, 1937.

At the conclusion of the trial on the merits, the Court of Claims recognized that defendant had repeatedly violated two of its contract obligations resulting in labor supply delays. As to these the Court concluded in the opinion that, "We think defendant should respond in damages * * *," but entered judgment dismissing plaintiffs' petition without awarding any damages because of difficulty in ascertaining the amount.

Jurisdiction of This Court

The judgment of the Court of Claims was entered on April 7, 1947. Plaintiffs' motion for a new trial duly filed June 5, 1947 was denied by order of the Court of Claims entered July 7, 1947 (R. 50).

The jurisdiction of this Court rests upon:

(1) The Act of July 23, 1937 (C. 520, 50 Stat. 533, 28 U. S. C. Sec. 250(b) in Supp.) which provides for review of the judgment of the Court of Claims "in the same manner as is provided by law in other cases in such court" (see Appendix, p. 42), and,

(2) The Act of February 13, 1925 (C. 229, Sec. 3, 43 Stat. 939) as amended by the Act of May 22, 1939, (C. 140, 53 Stat. 752; 28 U. S. C., Sec. 288 and Supp.). See Appendix, p. 43.

Relevant Parts of Statutes Involved

The primary statute involved is the Act of July 23, 1937 (C. 520, 50 Stat. 533, 28 U. S. C., Sec. 250(b) in Supp. The pertinent provisions of this Act are:

> "Jurisdiction is conferred upon the Court of Claims to hear, determine, and enter judgments against the

United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, * * * by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; * * *."

A complete copy of said Act is set forth in the Appendix hereto at p. 42.

Also involved are certain provisions of Title II, Section 206 of the National Industrial Recovery Act of June 16, 1933, (C. 90, Title II, Sec. 206, 48 Stat. 204, 40 U. S. C., sec. 406), the relevant parts of which are:

"Sec. 206. All contracts let for construction projects * * * pursuant to this title shall contain such provisions as are necessary to insure * * * (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (A) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates * * *."

By an Act of June 6, 1933, C. 49, 48 Stat. 113, 29 U. S. C. Sec. 49 etc., there was created in the Department of Labor a bureau known as the United States Employment Service,

for the establishment of a national employment system and for cooperation with the States in the promotion of such system. Section 3 of this Act outlines the duties of this bureau, and reads in part as follows:

> "Sec. 3. (a) It shall be the province and duty of the bureau to promote and develop a national system of employment offices for men, women, and juniors who are legally qualified to engage in gainful occupations, to maintain a veterans' service to be devoted to securing employment for veterans, to maintain a farm placement service, to maintain a public employment service for the District of Columbia and, in the manner hereinafter provided, to assist in establishing and maintaining systems of public employment offices in the several States and the political subdivisions thereof in which there shall be located a veterans' employment service. The bureau shall also assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States."

Questions Presented

Question 1

Under a contract for the furnishing by defendant of labor "qualified to perform the work to which the employment relates" and under an Act of Congress of July 23, 1937, specifically recognizing the right in contractors to recover excess costs incurred by reason of the Government having failed "to supply qualified labor under the labor clauses of the respective contracts" are plaintiffs entitled to recover

losses suffered as a result of defendant's having furnished workers who had to be trained on the job to enable them to do the work they were sent out to perform, and workers, 782 of whom, including 44% of the steel workers and 34% of the carpenters, were discharged after the obtaining by plaintiffs, as required by defendant, in each instance prior to discharge, of defendant's admission of lack of qualifications of these workers, to the comparative extent that of the total men furnished by defendant to plaintiffs the per cent of necessary discharges was about 87% greater than was the per cent of discharges on a job comparable in size getting its labor from the same source and being the only other job on which there are discharge figures in the record.

The Court of Claims denied recovery on the ground that the plaintiffs received average Government employment service labor and that this was all they were entitled to under the contract and under the Act of Congress.

QUESTION 2

Under a contract requiring plaintiffs to obtain labor through defendant's employment service "only where such labor is available," did disregard by defendant's local administrative officials of the rule of such service, which gave to plaintiffs the right to hire their own workers upon failure to receive labor from defendant within 48 hours from requests, entitle plaintiffs to recover for their injury from defendant's numerous delays in supplying labor exceeding 48 hours and up to 18 days, to the extent of 11,145 calendar man days, without permitting the hiring of plaintiffs' own workers during such delays.

The Court of Claims held that defendant was not obligated "to enforce the rule permitting the employment of plaintiffs' own labor where the defendant was not able to furnish it within 48 hours after the time it was requested,"

although defendant by introducing the rule in evidence as applicable and unsuccessfully contending that plaintiffs were notified thereof, in effect conceded that it was obligated to enforce the rule.

QUESTION 3

Was the proof sufficient both as to the amount of damages caused by the two breaches of contract which the Court of Claims recognized that defendant committed, and as to the amount of damages caused by defendant's other breaches, where the ratios of (1) the calendar man days of delays involved in the various breaches to (2) the total calendar man days of labor employment, furnished reasonable bases, when applied to actual cost figures, for approximating the amounts of direct damage and where fair men could have estimated an amount, within the bounds of reasonable compensation, for the additional damage resulting from the disorganization of crews and disruption of sequence of operations caused by the breaches.

The Court of Claims, stating that, "We think defendant should respond in damages * * *," for the delays involved in the two recognized breaches of contract, nevertheless denied recovery, because it failed to find proof conforming with the legal concept, "that there must be some reasonable basis for ascertaining the amount of damages."

QUESTION 4

Under contract terms contemplating "the selection of workers" by plaintiffs, the exercise by plaintiffs of normal control over their personnel and the obtaining of labor from defendant under prescribed preferences "only where such labor is available and qualified" to be "chosen" by plaintiffs "to the fullest extent possible" from men certified by defendant to be "qualified workers," were the

purported contract interpretations of the local representative of the contracting officer inconsistent with the contract in forbidding demotions of as well as requiring defendant's prior approval on lack of qualifications before refusing work to or discharging Government supplied workers, and if these requirements were inconsistent with the contract, are plaintiffs entitled to recover for their resulting injury, regardless of the granting of approvals by defendant without unnecessary delay?

The Court of Claims held that it was not "unreasonable" to require plaintiffs to give Government supplied workers a trial and, that even if the actual requirements "went beyond the power conferred" by the contract, the absence of unnecessary delay in granting the approvals barred plaintiffs from recovery.

Reasons for Allowance of the Writ

1. The Court of Claims in construing the plain contract words, "qualified workers" and "qualified to perform the work to which the employment relates" to mean the antithesis thereof, namely, the average workers who came through defendant's employment service, has rendered a decision as to the law governing interpretation of Government contracts in a way not in accord with the applicable decisions of your Honorable Court.

In addition to the general importance of having Government contracts interpreted equitably according to the rights of both parties, if contractors are to be so deprived of the benefits from plain and vital contract words the undesirable trend will follow for experienced contractors to submit excessive bids on or to avoid entering into contracts with their Government except on a cost plus basis.

2. The Court of Claims in holding that defendant's local administrative officials were at liberty to disregard the 48

hour rule which defendant itself introduced in evidence as applicable decided an important Federal question, which has not been, but should be settled by your Honorable Court. To show the far-reaching effects of this concept of law we need only to point to the conflict between such disregard of an applicable rule and the fundamental principle that ours is a Government of law rather than of men.

3. The Court of Claims in denying recovery on account of uncertainty as to the amount of damages from defendant's recognized breaches of contract, after concluding that the "defendant should respond in damages" for the delays involved in these breaches, and although the proof furnished a reasonable basis for approximating the amount of damages, decided an important question as to the law of damages, in a way in conflict with pertinent decisions of your Honorable Court, as well as its own decisions.

This expansion of the doctrine of uncertainty in the amount of damages, affording as it does a cover for escape of the wrongdoer, presents a matter of general importance, especially when, as in the instant decision, each of the three decisions of your Honorable Court cited as authority for denial of damages, permitted recovery.

4. Contrary to the decisions of your Honorable Court and its own decisions, the Court of Claims attempted to vest in defendant's administrative officials contract interpretative authority to exercise control over the hiring, demoting and discharging of plaintiffs' Government supplied labor, although such assumption of control was inconsistent with plaintiffs' contract rights.

It is of general importance that Government officials should not be encouraged by court precedent to impose, under the guise of reasonableness or expediency, requirements which are inconsistent with governing authority they are interpreting.

5. Your Honorable Court has not passed on the provisions in contracts with the United States for use of Government supplied labor in the construction of public works. If recessions or depressions should unfortunately develop again, there is substantial likelihood of repeated use of the same or similar labor clauses in public works contracts. Thus, it is a matter of importance not only to construction contractors, but to the Government as well to have an authoritative determination of the questions here presented regarding the interpretation of such labor clauses.

Wherefore, your petitioners respectfully pray that this petition for a writ of certiorari to review the judgment of the Court of Claims of the United States be granted.

And your petitioners will ever pray.

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FIELDING & SHEPLEY, INC.,
By KARL MICHELET,
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SIMON MICHELET.
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Of Counsel.

Washington, D. C., October 3, 1947.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The special findings of fact (R. 7), conclusion of law (R. 40) and opinion (R. 40) of the Court of Claims have not yet been reported.

Jurisdiction

The grounds on which the jurisdiction of this Court is invoked are set forth in the foregoing petition.

Statement of the Case

This breach of contract suit is one of several that were brought by different contractors for alleged excess costs from failure of the United States to supply qualified labor under the labor clauses of the respective contracts for the construction of locks and dams to improve navigation on the Mississippi River and its tributaries.

A Special Jurisdictional Act of July 23, 1937, conferred jurisdiction on the Court of Claims to hear, determine and enter judgments in these particular cases (Appendix hereto, post p. 42).

The instant suit was based on a contract entered into between petitioners and the United States on April 4, 1935, for the construction of the spillway gate structure for the Fort Peck Dam in Montana (R. 8, F. 2). The primary purpose was to improve navigation on the Missouri River (R. 8, F. 3).

Under the labor clauses of Art. 19 (a) and (b) of the contract, constituting the bone of contention in this case,

the workers defendant furnished were required to be "qualified workers" meaning "qualified to perform the work to which the employment relates" (R. 10, F. 6).

The "lists of qualified workers" from which Government supplied men were to be "chosen" by plaintiffs as provided in Art. 19 (b) were never "submitted" to plaintiffs. In lieu thereof plaintiffs agreed to a proposal of the district manager of defendant's National Reemployment Service, known as "NRS", to send out 25% more workers than the number needed as stated in plaintiffs' requests. Thus plaintiffs were to be afforded, as contemplated by the contract, a margin of choice of those to be employed (R. 18, F. 18).

Prior to the date of entering into the contract in suit, all the county offices of the NRS in Montana, including the one at Glasgow from which plaintiffs obtained their Government supplied labor, had been notified as follows by the State director of a Government rule:

> "The employer or a contractor cannot employ a man only in a supervisory capacity until he has first requisitioned your office in writing setting forther (sic) the number of men, the time work will start, and the type of work these men are to do, and if you cannot supply his demand within 48 hours after you have received this notice he may then employ his own men without referring to your list" (R. 17, F. 17).

Instead of permitting plaintiffs to hire their own men when Government supplied workers were not "available", as provided in Art. 19 (a) of the contract, within 48 hours, as provided in the rule, instead of furnishing workers "qualified to perform the work to which the employment relates" and instead of permitting the plaintiffs to choose among the Government supplied workers, defendant did as hereinafter set forth.

It required plaintiffs to have "written authorizations from NRS" before employing plaintiffs' own workers. In

no instance was an authorization granted on account of defendant's delays in furnishing the workers that defendant supplied late (R. 24, F. 32). Yet, as to 3,011 men or about 3/5ths of the approximate 5,000 NRS workers employed by plaintiffs in the years 1935, 1936 and 1937, there was delay in furnishing in excess of 48 hours after the dates of plaintiffs' requests for such labor. The undue delays in furnishing these 3/5ths without permitting plaintiffs to employ their own men ranged from 3 to 18 days after requests, totaling 11,145 calendar man days of delays in excess of 48 hours, and including 3,091 calendar man days of delays in excess of 6 days.[1] (R. 22-23, F. 31).

Many regular construction workers, not supplied by defendant or the local unions, but who came to plaintiffs' job seeking employment, had to be turned away because they were not registered with the NRS and plaintiffs could not promise such men work without an "authorization" (R. 27, F. 36).

Defendant's practice was to exhaust the possibilities of obtaining labor from its own supply before granting "authorizations" to plaintiffs. Even when defendant's supply was exhausted it delayed excessively before ascertaining that fact and issuing authorizations. Of the 117 worker positions authorized during the entire job in each instance because of defendant's inability to furnish labor of the classification requested, there was delay of over 48 hours and up to as late as 16 days after requests for the labor

[1] As to these NRS workers *furnished* late without granting authorizations, the Court of Claims concluded that defendant's obligation was to furnish them within 6 days or authorize plaintiffs to employ their own men. The Court further concluded that defendant had violated this limited obligation (R. 47). We contend that the time period of defendant's obligation was 48 hours, rather than 6 days, because 48 hours was the period provided in defendant's rule. Our brief, Point III, post pp. 28-31.

before issuing authorizations as to 56, aggregating 274 calendar man days of such undue delays [2] (R. 26-27, Fs. 34 and 35).

On May 4, 1935, one month after execution of the contract, defendant's local representative of the contracting officer (R. 13, F. 10) by written directions, under claimed authority from Article 19(b) of the contract, prohibited demotions of NRS workers below their referral classification and required that no worker furnished to plaintiffs by the NRS could be refused work or discharged without first obtaining an approval as to lack of his qualifications from one of defendant's inspectors (R. 15-16, F. 14).

Beginning in September of 1935, 5 months after execution of the contract, the approvals prior to discharge were required to be and were obtained in writing from defendant's inspectors (R. 30, F. 40).

The requirement of obtaining approvals of discharges was put into effect to obviate complaints about discharges of NRS workers and to have the record clear if complaints came back through political sources to the district engineer's office (R. 31, F. 40).

Relative to the furnishing of unqualified labor by defendant, out of the 5,143 NRS workers employed by plaintiffs in the years 1935, 1936 and 1937, 782 were discharged for cause, including in the two principal skilled classifications, 33.98% of the NRS carpenters, and 44% of the NRS structural steel workers (R. 31, F. 40). Those discharged for incompetency, exclusive of the 76 discharged for other causes, were on the job a total of about 12,072 calendar man days, before the required admissions from defendant as to their lack of qualifications were obtained (R. 31-32, F. 40).

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[2] As to the 56 worker positions *authorized* late after exhaustion of defendant's supply of workers, the Court of Claims concluded that defendant violated its obligation by delaying more than 2 days (same period as in 48-hour rule) in granting the authorizations (R. 47-48).

The only other job as to which there are discharge figures in the record, is the one performed by Spillway Builders, Inc. (Def.'s. ex. AU, R. 97-99, 94-95). That job was part of the Fort Peck project, covered excavation and construction of the mile long concrete spillway channel immediately downstream from plaintiff's gate structure, was constructed during substantially the same period as plaintiffs' job, and obtained its labor from the same NRS office as did plaintiffs (R. 12, 17, Fs. 8 and 16).

Of the total of about 5,012 NRS workers (5,395 referred less 383 who didn't go to work) employed by Spillway Builders, Inc., during the years 1934, 1935, 1936 and 1937, 415 or 8% were "discharged with prejudice." These figures include 538 NRS workers employed in the skilled classifications (573 referred less 35 who didn't go to work) of whom 61 or 11% were "discharged with prejudice" (Def's. ex. AU, fol. 381, R. 99).

Of the total of about 5,384 NRS workers (5,909 referred less 525 who didn't go to work) employed by plaintiffs in the years 1935, 1936, 1937 and 1938, 820 or 15% were "discharged with prejudice." These figures include 579 NRS workers employed in the skilled classifications (642 referred less 63 who didn't go to work) of whom *177* or 30% were "discharged with prejudice" (Def.'s ex. AL, sheet 3, R. 97, 94).

Thus, although the Court of Claims did not make any finding on the material issue presented by this comparative evidence, plaintiffs' percentage of discharges of NRS workers was about 87% greater (15% as compared to 8%) than the comparable percentage on the only other job on which there are discharge figures in the record.

Although on the average job some training in the unskilled and semi-skilled classifications is normal and to be expected, plaintiffs were compelled to perform a substantial amount

not only in those classifications, but also of men sent out by the NRS as carpenters, structural steel workers and operators of equipment (R. 33, F. 43).

With the quality of labor being received from the NRS coupled with the delay of the NRS in supplying labor, plaintiffs were compelled to instruct and train men in substantially all categories of the work required on the job, and then promote such men to the higher classes of work. Plaintiffs were limited by an administrative ruling to a period of one week within which to train a worker in a higher paid classification before raising the trainee's pay to the rate of such higher classification. Under the contract provisions for a 40 hour week and an 8 hour day (R. 11) the one week training limitation meant 5 working days for training each man before promotion. Yet promotions resulting from instruction and training by plaintiffs totaled 1,190. Thus, exclusive of the time of other workers and supervisory personnel consumed in giving the training about 5,950 calendar man days of trainees' time, before promotion, was consumed in this training. Approximately one-half of 60 promotions to skilled workers, resulting from training by plaintiffs, were made from laborers referred from the NRS, whereas union requirements for the skilled classifications required a period of four years' experience as apprentices or helpers (R. 33-35, F. 43).

Delays in the progress of plaintiffs' work were caused by the inexperience of the workers referred to the job by defendant, the undue delays in referring them, and the undue delays in granting such authorizations as were issued to plaintiffs to employ their own men (R. 35, F. 47).

Relative to the amount of damages suffered by plaintiffs from defendant's breaches of contract and involving an issue on which the Court of Claims failed to make any finding there were 371,048 calendar man days of labor employ-

ment on the job in the years 1935, 1936 and 1937 (Pl.'s ex. 94, R. 100, 94).

The 12,072 calendar man days of employment of NRS workers in these same years, whom defendant admitted to be incompetent before their discharge, are 3.256% of the 371,048 total. 3.256% of plaintiffs' costs of $1,802,277.95 (R. 38-39, F. 50) for the gate structure, including direct labor costs for 1935, 1936 and 1937 and general overhead costs for the years 1935, 1936, 1937 and 1938 equals $58,682.21 damage from defendant's breach of contract in furnishing unqualified workers who had to be discharged.

The 5,950 calendar man days of trainees' time consumed prior to promotion in training for higher rated classifications are 1.6% of the 371,048 total. 1.6% of plaintiffs' actual costs of $1,802,277.95 (R. 39, F. 50) for constructing the gate structure, equals $28,836.45 damage arising out of defendant's failure to furnish qualified labor which made the training necessary.

The 11,145 calendar man days of defendant's excessive delays beyond 48 hours in furnishing the workers it did supply plus the 274 calendar man days of excessive delays beyond 48 hours in issuing authorizations granted, but granted late, are 3% of the 371,048 total. 3% of the $670,-105.90 general overhead costs (actual costs exclusive of direct labor costs, R. 38-39, F. 50) equals $20,103.18 damage from defendant's undue delays in referring workers late and in issuing authorizations late.

In the alternative, confining the breaches of contract to those recognized by the Court of Claims, the 3,091 calendar man days of defendant's excessive delays beyond 6 days in furnishing the workers it did supply, plus the 274 calendar man days of excessive delays beyond 48 hours in issuing authorizations granted late, are .9068% of the 371,048 total. .9807% of the $670,105.90 general overhead costs for the gate structure equals $6,076.52 damage.

None of the above approximate damage figures include any amount for the excess costs from the disorganization of crews and disruption of sequence of operations caused by the breaches (R. 13-14, 33, Fs. 11 and 43).

Specification of Errors to Be Urged

1. The Court of Claims erred as a matter of law in construing the words in Art. 19 of the contract "qualified workers" and "qualified to perform the work to which the employment relates," by interpreting them to mean average Government employment service labor.

2. The Court of Claims committed the same error in construing the words "qualified labor under the labor clauses of the respective contracts" as used in the Act of Congress of July 23, 1937, when applied to the contract labor clauses in suit.

3. The Court of Claims erred as a matter of law in failing to construe the labor qualification requirements in the instant contract and in said Act when applied to such contract to mean workers competent, fit and capable of performing the heavy construction work on the instant job.

4. There is a lack of substantial evidence to sustain the findings in the last paragraph of Finding 42 that plaintiffs' dismissals for cause were not abnormal but were low when compared with other projects of this size and that the proportion of incompetent to competent workers was about the same as on other jobs where the labor was obtained through the NRS offices in rural communities.

5. The Court of Claims erred as a matter of fact in failing to make any finding regarding the evidence on the material issue of whether or not out of the total men furnished by the Government to plaintiffs the per cent of discharges was about 87% greater than was the per cent of

similar discharges on a job of the same size, getting its labor from the same source and being the only other job on which there are discharge figures in the record, namely, that of Spillway Builders, Inc., on the Fort Peck Project.

6. The Court of Claims erred as a matter of law in failing to conclude that those Government supplied workers who had to be given the necessary training on the job to enable them to perform the work they were sent out to do as well as those who were discharged for incompetency were unqualified under the contract.

7. The Court of Claims erred as a matter of law in failing to conclude that plaintiffs are entitled to recover the excess costs caused by the Government having supplied labor not qualified under the terms of the contract.

8. The Court of Claims erred as a matter of law in concluding that defendant was not obligated to enforce the National Reemployment Service's 48 hour rule in its dealings with plaintiffs.

9. The Court of Claims erred as a matter of law in failing to conclude that defendant should respond in damages for disregarding the 48 hour rule and enforcing against plaintiffs a practice contrary to said rule.

10. The Court of Claims erred as a matter or law in concluding that the administrative requirements against demoting of and for obtaining approvals as to lack of qualifications from defendant before plaintiffs refused to employ or discharged Government supplied workers, were not unreasonable.

11. The Court of Claims erred as a matter of law in failing to conclude that these administrative requirements were inconsistent with plaintiffs' contract rights of selection

among Government supplied workers and of employing their own workers from any source they chose when the Government did not supply workers promptly.

12. The Court of Claims erred as a matter of law in failing to conclude that these administrative requirements, as enforced, constituted breaches of the labor clauses of the contract in aggravation of plaintiffs' injury from defendant's supplying of unqualified labor.

13. The Court of Claims erred as a matter of fact in failing to make any finding regarding the evidence on the issue, material to affording a basis for approximating the amounts of damage from defendant's various breaches, of the number of calendar man days of labor employment on the job in the years 1935, 1936 and 1937.

14. As to the breaches of contract it recognized, the Court of Claims erred as a matter of law in concluding that the proof failed to afford a reasonable basis for approximating the amount of damages.

15. The Court of Claims erred as a matter of law in refusing to enter judgment for the plaintiffs for the amount of plaintiffs' excess costs incurred by reason of the Government having failed to supply plaintiffs with qualified labor under the labor clauses of the contract.

ARGUMENT

Point I

The construction placed by the Court of Claims on the labor qualification requirements of the contract conflicts with the rules for construing contracts prescribed in the decisions of your Honorable Court.

The determinative question here is one of contract interpretation, namely, whether defendant's obligation to fur-

nish "qualified workers" to plaintiffs called for nothing more than average NRS workers from a farming community so long as they were not wholly without qualification or whether that obligation called for workers competent in their respective classifications, at the time they were furnished, to perform the construction work of which the job consisted.

The standard of qualifications for deciding whether or not defendant is liable for the incompetent and inexperienced labor it furnished must be determined from the contract labor clauses, because the Act of Congress of July 23, 1937, under which this suit was brought, provides for recovery for defendant's failure "to supply *qualified labor under the labor clauses* of the respective contracts." (Emphasis supplied.)

The word "qualified" was used five times in the labor clauses of Art. 19 of the contract as descriptive of the kind of workers to be supplied by defendant and, at plaintiffs' election, by union locals (R. 10, F. 6). The intended meaning of "qualified" was spelled out in detail by use of the clause "qualified to perform the work to which the employment relates." The intended standard of being competent, fit and capable for performance of the type of work called for by the contract, namely, heavy construction work, was further revealed by use of the phrase "qualified union workers." Without the added refinement of "qualified," to be a union worker in the skilled classifications required four years experience as an apprentice (R. 34-35, F. 43).

A word like "qualified" used by the parties in a specific sense is to be interpreted in the same sense throughout the writing in the absence of countervailing reasons. *White* v. *Knickerbocker Ice Co.*, 254 N. Y. 152, 158-159, 172 N. E. 452, 454; *Miller Cattle Co.* v. *Mattice*, 38 Ariz. 180, 188, 298

Pac. 640, 643; *Rockwell* v. *New Departure Mfg. Co.*, 102 Conn. 255, 302-304, 128 A. 302, 317-318; Williston on Contracts, sec. 618, par. 3.

The workers furnished by defendant, admitted by its representatives to have been unqualified in a large number of instances, fell far short of having the qualifications required by the "qualified" labor clauses of the contract (Ante, p. 14).

The Court of Claims exempted defendant from liability by construing the contract as if the word "qualified" as used in the labor clauses had been omitted with the provision remaining for obtaining labor through defendant's employment service. Defendant's obligation was erroneously limited by the Court's construction to supplying average NRS workers whether or not they were qualified. As authority for its construction, the Court relied on the case of *Seeds & Derham* v. *United States*, 92 C. Cls. 97, certiorari denied 312 U. S. 697 (R. 43-44). However, the doctrine of that case is fundamentally inapplicable because the contract there in suit, unlike the instant contract, contained no representation whatsoever as to the qualifications of the Government supplied workers, but on the contrary required that they be furnished from relief rolls. As held by the Court of Claims the average of labor coming through the Government's local employment service office whether or not qualified to perform the work satisfied the Government's obligation under the *Seeds & Derham* case contract. The court's action in placing the same construction on the instant contract is erroneous because it ignores the word "qualified" in the labor clauses and conflicts with the case *of Fidelity & Deposit Co.* v. *Pink*, 302 U. S. 224, 229, holding that the ordinary meaning of contract language controls in the absence of attending circumstances requiring disregard of such meaning.

Defendant was obligated to supply only the "available and qualified" NRS workers in Montana entitled to preference, so it was not compelled to lower its sights as to quality to meet any quantity obligation. If the supply of such workers from defendant proved insufficient, the contract contemplated that plaintiffs have the privilege and responsibility of obtaining qualified labor without limitation as to geographical area or source.

The case of *Nolan Bros. Inc.* v. *United States*, 98 C. Cls. 41, cited in the instant opinion, clearly brings out by contrast the construction placed on the contract labor clauses here at issue. In that case liability for the referral of NRS workers subsequently discharged was confined to those who were "wholly without qualification" for that was the basis upon which the Court distinguished the instant case from the *Nolan* case (R. 44). The "qualified" labor clauses of that contract and the instant contract were the same in all material respects and no circumstances in either case warranted the interpretation of "qualified" to mean *not* "wholly without qualification."

Had the Act of Congress, authorizing the instant contract, not specifically provided for use in the contract of the exact words used, namely, "qualified to perform the work to which the employment relates"[3] and had the contract pursuant to authority stipulated for use of the average of the workers who came through the local office of defendant's employment service or in the alternative, for use of workers *not* "wholly without qualification," there can be no doubt that the bids would have been much higher. Thus, construing the instant contract language to mean the hypothetical contract language, as the Court of Claims has done,

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[3] The instant contract was authorized under Title II of the National Industrial Recovery Act of June 16, 1933 (R. 9, F. 6). The provisions of that act material here are quoted *ante*, p. 4.

conflicts with the rule for interpreting contracts approved in the case of *Utley* v. *Donaldson,* 94 U. S. 29. This rule is stated in the majority opinion of the Court at p. 46 as follows:

> "Every intendment is to be made against the construction of a contract under which it would operate as a snare."

In addition to being liable for furnishing incompetent and inexperienced NRS workers when the contract required that they be "qualified," defendant further became liable for the unqualified labor it supplied by wrongfully depriving plaintiffs of their contract right of selection in hiring, demoting and discharging. See Point IV, post, pp. 32-36.

Regarding the training and teaching made necessary by defendant's furnishing of unqualified labor and delaying in the supply of workers, the decision in the instant case, denying liability, is inconsistent with the decision of the Court of Claims involving a suit brought under the same Special Jurisdictional Act on an indistinguishable contract in the case of *Nolan Bros., supra.* There the opinion of the Court states at page 88 of 98 C. Cls.:

> "However, we are unable to find any provision in the contract which placed upon the plaintiff the duty of training men in order to secure the necessary number of skilled men, and it hardly seems just that plaintiff should be compelled to bear the expense of the training thus given."

By way of summary, the word "qualified" in the labor clauses of the instant contract should be construed by your Honorable Court to impose liability under the Special Act for the incompetent and inexperienced labor defendant furnished plaintiffs.

Point II

The Court of Claims erroneously failed to make any finding on the material issue presented by evidence showing plaintiffs' discharges for cause of Government supplied workers were about twice as high as those on an adjacent job of the same size.

The finding that plaintiffs' discharges for cause and proportion of incompetent workers were not abnormal in comparison with jobs in general of the same size is not supported by substantial evidence.

In spite of plaintiffs' "policy of giving each worker who showed willingness to learn, a chance to acquire experience," (R. 33, F. 43), discharges of NRS workers were 87% higher on plaintiffs' job than on the same sized, adjacent job of Spillway Builder's, Inc., as conclusively shown by defendant's exhibits based on official records. These two jobs are the only ones on which there are discharge figures in the record. Ante, p. 15. The Court of Claims, we contend erroneously, failed to make any finding for comparative purposes relative to the uncontradicted evidence on the discharges of Spillway Builder's, Inc.

Without finding any independent facts as to the number or per cent of discharges or as to the proportion of incompetent workers on any job other than plaintiffs' the Court of Claims in the last paragraph of Finding 42 (R. 33), concluded that, as compared to other "projects of this size," unnamed and undescribed, and "other jobs" obtaining labor from the NRS in rural communities, plaintiffs' proportion of incompetent workers "was about the same" and plaintiffs' discharges "were not abnormal" but "low."

Convincing evidence is required to sustain such findings where plaintiffs' discharges, as shown by defendant's own proof from records, were about twice as high percentage

wise as those on the same sized project of Spillway Builder's, Inc. *Pennsylvania R. Co.* v. *Interstate Commerce Commission,* 3 Cir., 66 F. 2d 37, 38, 39, aff'd. 291 U. S. 651; *Pick Mfg. Co.* v. *General Motors Corp.,* 7 Cir., 80 F. 2d 641, 644 aff'd. 299 U. S. 3; *Morton Salt Company* v. *Federal Trade Commission,* 7 Cir., 162 F. 2d (adv. sheets) 949, 958.

The kind of evidence necessary, but fatally lacking in support of the finding, is proof of facts and figures, showing as to some other job or jobs, percentages of discharges and proportions of incompetent workers, as high as plaintiffs.

The admission by plaintiffs' general manager of receipt of "probably" average NRS workers, without admitting them to be in any way qualified, as cited in the Court's opinion (R. 43, 53), furnishes no support to the comparative findings under attack. No fact found shows that the work included in the other jobs, used as a basis of comparison, was as difficult or complicated as plaintiffs'. The more difficult the work included in a construction project the longer it would take inexperienced workers to become competent at any one operation, and hence with receipt of inexperienced workers like those referred to plaintiffs, (R. 35, F. 47), coupled with men quitting and being discharged to the extent of about 65% of the number employed, (R. 32, F. 41), the proportion of incompetent men on a difficult job would be constantly higher rather than "about the same" as on less difficult jobs. Magnifying this difference the more varied the operations, the greater would be the number of retrainings necessary for inexperienced workers to attain competency at each varied operation.

The only other evidence purporting to sustain the challenged comparative findings is general conclusion testimony characterizing plaintiffs' total discharges as "low" without stating any figures or percentages as to what would be normal in any classification or for any job (2 witnesses, R. 86, 91) and characterizing plaintiffs' workers in the sep-

arate classifications as being on an "average" with and comparing "favorably to" the workers in such classifications on other jobs (R. 55, 61, 63, 72, 78-79, 80, 83, 85-86). This testimony was given by members of the Government inspection force, an assistant engineer of the Spillway section who also did inspection work and the general superintendent employed by Spillway Builder's, Inc. on its Fort Peck job, who at the time of testifying was a lieutenant colonel in the Army doing construction work for the Government (R. 56-57, 59-60, 71-72, 77-78, 79, 82, 85, 90-91).

Two of the witnesses admitted that the workers referred to plaintiffs were largely farmers and sheepherders inexperienced in construction work (R. 58-92).

The general superintendent for Spillway Builder's, Inc., whose testimony regarding plaintiffs' discharges is relied on and quoted in the opinion (R. 43, 86) admitted he did not have sufficient knowledge about the discharges on his own Fort Peck job to compare them with plaintiffs' (R. 87). He didn't know whether the turnover including discharges on his previous jobs was the same as on his job at Fort Peck "because I never made a study of it" (R. 89). His testimony on direct examination that he believed the quality of labor he observed on plaintiffs' job to be the same as on his own job (R. 86) is of no value because on cross-examination he admitted that the kind of observation he gave to plaintiffs' workers was not sufficient to compare them as to ability with the men on his own job and his prior jobs (R. 89-90). His testimony on the subject of this finding is obviously based on surmise rather than knowledge of facts and figures as to other jobs and unlike the finding avoids a comparison between plaintiffs' discharges and those on other jobs.

Defendant's assistant engineer for the spillway section admitted that plaintiffs' experience of 7 quits, each after at least 70 days' service with only one discharge out of 24

carpenters selected and hired by plaintiffs on authorizations in 1937, was a more normal kind of turnover when a contractor is hiring his own men (R. 93).

None of these witnesses stated and most of them were asked and refused to state any percentage of discharges as occurring on other jobs or being normal or average in the classifications of work with which they were familiar (R. 67-68, 75-77, 80, 84).

On this record the evidence in support of these comparative findings is not substantial, even apart from the proven fact that plaintiffs' discharges were about twice as high as those of Spillway Builders, Inc.

Although the denial by the Court below of liability for the incompetent and inexperienced labor furnished by defendant is erroneous, whether or not the findings here attacked are faulty, since they fail to rebut the unqualified character of such labor, nevertheless the lack of support for and the showing by uncontradicted evidence of ultimate facts contrary to the comparisons found, makes reversal of the judgment more urgent.

Point III

Defendant in administering the contract was obligated not to impose requirements contrary to the valid Government 48-hour rule, to which Government employment service was subject in supplying labor under the contract.

The law as to whether defendant was entitled to disregard such a rule is not and should be settled.

We contend that defendant's counsel, through their actions during the trial, in effect conceded that the Glasgow NRS office was subject to the jurisdiction of the 48 hour rule in supplying labor under the instant contract. We assert and believe the Government will not deny that it introduced

the rule in evidence and requested the hearing Commissioner to make the following recommended finding of fact, which he made and neither party excepted to:

> "The State office of the National Reemployment Service in November, 1933, promulgated a rule of general application that if their offices were unable to fill a contractor's requisition within 48 hours, the contractor would be at liberty to employ his own men to fill his needs. (Def.'s. Ex. CL)."

The findings of fact in the case of *James Stewart Corporation* v. *United States*, C. Cls. No. 45051, decided May 5, 1947, Finding 20, page 13 (not yet reported), involving the construction of a dam in Iowa under the same type of contract as plaintiffs' show:

> "* * * The National Reemployment Service regulations permitted contractors to secure qualified labor elsewhere, if the local office could not supply it within 48 hours after demand and the local agent made affidavit to that effect."

There was statutory authority "to promote and develop a national system of employment offices" and for "prescribing minimum standards of efficiency" (Ante, p. 5). The word "available" used in Art. 19 of the instant contract as a limitation on the workers required to be obtained through defendant's employment service, is not only consistent with but implied the existence of some definite time limit within which employment service workers were to be supplied, such as the 48 hours prescribed in defendant's rule.

The synonyms given for "available" in Webster's New International Dictionary are:

> "Ready, handy, convenient, usable, obtainable."

The Century Dictionary and Cyclopedia gives the following illustration of the correct use of the word "available":

> "The whole army is called 700,000 men, but of these only 80,000 can be reckoned available. *Brougham.*"

The Court of Claims rejected the 48 hour period and substituted six days in arriving at defendant's obligation as to the NRS workers furnished late on the ground that enforcement of the 48 hour rule would have defeated the contract preferences mentioned by the Court for citizens of the local county and for citizens of the State (R. 46). It should be observed here that the contract preferences were specifically limited by the clause in Art. 19 (a) making them applicable "only where such labor is available and qualified." The Court asserted in the opinion that, "The NRS could not have gotten to the job within this time (48 hours) many of those for whose benefit the work was initiated," (R. 46), although no special finding of fact shows any longer period than 48 hours was necessary or lends any support to the conclusion. Tending to establish the meaning of the contract word "available" and the reasonableness of 48 hours for supplying such labor in Montana as was "available and qualified" is the special finding of fact on sending the 48 hour rule to all county NRS managers in Montana (R. 17, F. 17).

There are no special findings of fact to support a conclusion that 6 days were reasonably necessary to get to the job the available and qualified NRS workers in Montana, who were the men entitled to preference. Other factors such as assumptions about the contractors anticipating their needs were taken into consideration by the Court in substituting six days for the 48 hours provided in defendant's rule (R. 47). Thus, in addition to the reason of lack of support in the special findings of fact, the six day period must yield to the 48 hour period to avoid enforcing

preferences in favor of non-available workers, contrary to the contract. Six days would have been more than sufficient to get many workers to the job from as far away as the East Coast.

Being consistent with the contract and appropriate and reasonable in giving meaning to the word "available" the 48 hour rule became a part of the contract by being an integral part of defendant's employment service in Montana which was to furnish labor under the contract.

Defendant's action in requiring, before permitting employment of plaintiffs' own men, written authorizations, not issued on account of delays in supplying workers, in spite of such delays of between 48 hours and 18 days as to 3/5ths of the approximate 5000 NRS workers furnished, violated the contract and the 48 hour rule.

Defendant also violated its implied obligation of cooperation in failing to notify plaintiffs of the rule (R. 17, F. 17). Williston on Contracts, sec. 670.

Defendant, through its administrative officials, was not at liberty to disregard an applicable rule and thereby deprive persons of rights they were entitled to under such rule. *Sibray* v. *U. S.*, 3 Cir., 282 F. 795, 797-8.

Under the contract supplemented by defendant's rule we submit that 48 hours rather than 6 days was the period within which defendant was obligated alternatively to furnish the workers requested, or upon failure to do so, to authorize plaintiffs to hire their own workers.

Point IV

Contrary to its own prior decisions and the case of Hollerbach v. United States, 233 U. S. 165, the Court of Claims denied recovery for the injury from defendant's action, inconsistent with the contract, in assuming control over plaintiffs' hiring, demoting and discharging of Government supplied workers.

The contract is determinative of the issue of lack of authority for defendant's administrative requirements forbidding demotions of and calling for its approval on lack of qualifications before refusing work to or discharging any men furnished by the NRS (R. 15-16, F. 14). No statutory authority is claimed and there was none for promulgating rules or regulations in this field.

The contract provisions material here were construed by the Court of Claims in the cases of *Western Construction Company* v. *United States*, 94 C. Cls. 175 and *Nolan Bros. Inc.* v. *United States, supra.*

The opinion of the Court in *Western Construction Company* case stated at page 199 of 94 C. Cls.:

> "* * * Plaintiffs were the judges of the qualifications of their employees and were free to reject any man referred to them by the NRS for any reason which appeared to them sufficient for rejection or to discharge any man employed by them for incompetency, inefficiency or for any other reason."

In allowing recovery for the Government's invasions of the contractor's right of selection in the *Nolan* case the Court stated in its opinion at page 86 of 98 C. Cls.:

> "Conceding, in line with defendant's contention, that the duty of selecting qualified men devolved upon plaintiff and that the defendant was under no obligation except to send over groups of men with their own state-

ments as to their qualifications, the entire responsibility for making selection was thus placed upon the plaintiff. Having disclaimed all responsibility, the defendant should not have repeatedly interfered with plaintiff's exercise of this responsibility and discretion. Its action in this regard undoubtedly increased the cost of performance. Again, we are not passing upon the right of the men to complain, nor of the wisdom of the practice generally of endeavoring to get an opportunity for the men whom plaintiff found wanting. But we have construed the contract in such a way that the entire responsibility for the selection of the men is placed upon the plaintiff. It seems that the defendant should bear the extra expense of this procedure, notwithstanding it may have been the just, wise, and humane thing to do."

The contracts in the two cited cases, as well as the instant contract, specifically provided for the contractor's right of selection. Each provided that employment service labor "*shall be chosen* from lists of qualified workers *submitted* by local employment agencies * * *." (Italics supplied). Each stipulated that "*In the selection of workers* from lists prepared by such employment agencies and union locals, the labor preferences provided in section (a) of Article 19 shall be observed" (Italics supplied).

The obvious discrimination in the instant case in confining the benefits of defendant's requirements to NRS workers to the exclusion of the 41 men furnished to plaintiffs in accordance with the labor clauses of the contract by the local unions (R. 19, F. 23), is left unexplained. The Court of Claims did not purport to justify the requirements imposed, but contended there was contract authority for requiring something less drastic, namely, giving a try out to the NRS workers. The clause "To the fullest extent possible," cited by the Court from Art. 19(b) (R. 44) was obviously not intended to take away the right of choice in

the contractors among "qualified workers" to be supplied by the Government as provided in the same sentence. The purpose of the clause, read in connection with the other provisions of Art. 19, was to prevent the contractors from hiring their own men, before selecting those they deemed qualified among available NRS workers. Had the contract contemplated the impractical result of split authority over hiring and discharging, specific language to that effect would have been used. Also, had interference with the contractor's right of selection been intended for the benefit of NRS workers, but not for the benefit of men furnished by local unions, there would have been a contract provision to that effect.

Defendant's requirements as to the hiring, demoting and discharging of NRS workers, being contrary to plaintiffs' specific right of selection, it is going too far to interpret a general contract provision as authorizing them. *Hollerbach* v. *United States*, 233 U. S. 165, 172.

Many of the NRS workers arrived more than 6 days and up to 18 days after request (R. 23, F. 31). Plaintiffs were not permitted to refuse these men work without getting approval from defendant, because defendant's requirements applied to NRS workers furnished without limitation as to when they were furnished (R. 22, F. 28). The opinion of the Court of Claims is inconsistent in upholding defendant's authority to require a try out for all these NRS men (R. 44) when elsewhere in the same opinion it recognized plaintiffs' right to hire men of their own choosing from any source after defendant failed to furnish men within 6 days (R. 47). Defendant's requirements, applicable and applied to NRS men furnished as late as 18 days after request, were inconsistent to an even greater extent, with its own rule giving plaintiffs the right to hire their own men after 48 hours.

The Court's conclusion that prompt granting of approvals for discharges prevented harmful effects to plaintiffs from defendant's requirements (R. 45) is contrary to the special findings of fact.

Defendant's inspectors were required not to grant permission for discharge until the contractor's charges against NRS men had been investigated and found true (R. 30, F. 40). This explains why the finding as to the time of granting of approvals was qualified by the phrase "without unnecessary delay" (R. 31, F. 40). In other words the requirement of obtaining approvals of discharges did involve delay but no more than was necessary for making the investigations and inevitably undermined the contractors' control over their personnel.

The prohibition against demoting NRS workers below their referral classification was not satisfied by obtaining any approval and thus its harmful effect cannot be explained away regardless of how or when approvals were granted. The Court in its opinion ignored this prohibition and thus left it unjustified, although it obviously obstructed putting NRS men at work according to such abilities as they demonstrated. To accomplish the result of a demotion of a man unqualified at work of his referral classification, involved the cumbersome process of discharge, return to the NRS office in Glasgow and attempt by plaintiffs to have the man re-referred at a lower classification (R. 30-31, F. 40), during the course of which the plaintiffs would "oftentimes lose his services entirely" (R. 34, F. 43).

Applicable to the injury suffered from the wrongful requirements under discussion and involving similar Government interference which, however, was less extensive and which occurred after rather than before discharge of NRS

workers, is the statement in the opinion of the Court in the *Nolan* case at p. 86 of 98 C. Cls., that:

> "Its action in this regard undoubtedly increased the cost of performance."

The inconsistency in the instant case between plaintiffs' contract rights and defendant's requirements, together with the inevitable harmful effects from these requirements, we believe establish error on the part of the Court of Claims in denying liability.

POINT V

Contrary to the conclusion of the Court of Claims and within the requirements of the decisions of your Honorable Court, the proof included a reasonable basis, on which no finding was made, for approximating the amount of damages.

Recovery was denied in toto, although the opinion states as to two recognized breaches of contract, "We think defendant should respond in damages * * *."

The real question here is as to the amount of damages for the findings show that plaintiffs were injured by defendant's administration of the labor provisions of the contract. Plaintiffs were injured by defendant's undue delays in granting the authorizations it issued later than 2 days after requests for workers (R. 27, F. 35). Had the authorizations issued late been issued on time plaintiffs would have been that much ahead in obtaining the needed workers, whom defendant after undue delays found itself unable to secure, but whom plaintiffs actually did secure for themselves subsequent, however, to receipt of the tardily issued authorizations (R. 27, F. 36). Plaintiffs were also injured by defendant's numerous undue delays in the referral of workers it eventually furnished. These two kinds of undue de-

lays, as well as "the inexperience of workers referred to the job," caused delays to the work (R. 35, F. 47). As to each of these causes of delay, except the inexperience of the workers, the Court of Claims concluded in the opinion, "We think defendant should respond in damages * * *" (R. 47-48).

However, no damages whatsoever were awarded because the Court below confined its consideration on this issue to the part of the evidence bearing on establishing the amount of damages deductively from the total excess costs incurred of over $200,000.00.[4] The difficulty of apportioning the excess costs between actionable and nonactionable causes was held fatal to this deductive method (R. 48-49).

The opinion indicates that no consideration was given to the separate evidence furnishing an inductive reasonable basis for approximating damages from the various breaches of contract.

The Court below erroneously failed to make any finding on the evidence showing the number of calendar man days of employment of labor on the job to have been 371,048 in the years 1935, 1936 and 1937, during which defendant failed to furnish qualified labor. Except for the omission of this figure, the facts in the findings furnish a reasonable basis for approximating the amount of damages from defendant's separate breaches of contract. The basis is to apply to the appropriate actual cost figures in the findings the ratios of (1) calendar man days of delays to the job involved in the various breaches over (2) the 371,048 figure for calendar

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[4] Excess direct labor costs of at least $122,902.70 were incurred which is 11.61% of plaintiffs' actual direct labor costs of $1,058,810.81 (R. 39, F. 51). Applying the 11.61% to the $73,361.24 paid as payroll insurance and taxes on direct labor payroll (R. 39, F. 50) gives $8,517.24 of excess costs for insurance and taxes on direct labor. Applying the same percentage to the actual general overhead costs of $670,105.90 (R. 39, F. 50) gives $77,799.29 excess general overhead costs. $122,902.70 plus $8,517.24, plus $77,779.29 equals $209,219.23 of excess costs.

man days of labor employment on the job. (Ante, pp. 16-17). As to the selection of the appropriate cost figures in applying the ratios (see ante, p. 17) it is obvious that the incompetent workers on the job and the workers trained on the job not only delayed the work, thereby increasing overhead costs, but also failed to earn the wages they received, thereby increasing direct labor costs. On the other hand, although the undue delays in referring workers late without granting authorizations and the undue delays in granting authorizations issued solely because of exhaustion of defendant's supply both delayed the job, thereby increasing overhead costs, such causes of delay did not involve receipt of unearned wages.

The calendar man days of undue delays in furnishing workers late is an acceptable measure of damages although defendant could have avoided this particular liability had it permitted plaintiffs to hire their own men at the end of 48 hours from the dates of requests for the labor. If there is some uncertainty as to the extent of the benefits which plaintiffs would have derived had they been so permitted to use this supplemental source of labor supply, defendant caused the uncertainty by failing to grant authorizations on the 48 hour basis or any time basis whatsoever. Under these circumstances the risk of having doubts resolved against it should be borne by defendant whose wrongful conduct precluded a more precise showing. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 265; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563.

Had authorizations been issued in accordance with the 48 hour rule, one source for filling them was the "Many regular construction workers," who came to the project, but had to be and were turned away because they were not registered with the NRS (R. 27, F. 36). Furthermore, with the inevitable increase in the issuance of authorizations, had

the 48 hour rule been put into practice, the volume of construction workers attracted to the project would obviously have substantially increased.

Also, under defendant's actual practice of exhausting its sources of supply, resulting in long delay in securing workers, plaintiffs could not promise a man employment because they did not know when authorizations would be issued (R. 27, Fs. 35, 36). Defendant's observance of the 48 hour rule would have made it practicable, which it was not under defendant's actual practice, for plaintiffs to contact in advance qualified workers from outside sources and make arrangements for having them on hand when needed.

To support its denial of recovery to plaintiffs on account of uncertainty as to the amount of damages the Court of Claims relied on excerpts from the opinions in the three cases of *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359; *Palmer* v. *Connecticut Ry. Co.*, 311 U. S. 544 and *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251. Each of these cases, however, held in favor of allowing recovery and no case cited by the Court of Claims on the issue of damages denied recovery.

The inductive calendar man day basis in plaintiffs' proof as already discussed meets the concept announced in the excerpts from the three cases that a reasonable basis for approximating the amount of damages is sufficient.

Both the deductive basis, supplemented by the detailed facts regarding the nature and extent of the breaches and the inductive basis, now chiefly relied on, meet the requirements of proving damages held sufficient in the case of *Hetzel* v. *Baltimore & Ohio R. Co.*, 169 U. S. 26. There the test as stated in the opinion at page 37 was:

> "All that the law requires is that such damages be allowed as in the judgment of fair men, directly and

naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages."

To similar effect is the most recent pronouncement of your Honorable Court on the applicable principles where the fact of injury is certain and the uncertainty lies only in the amount of damages. We refer to the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, in which the opinion states at page 688:

> "* * *. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.' *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 563, 75 L. Ed. 544, 548, 51 S. Ct. 248. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of damages."

Where defendant's extensive breaches of contract, injury therefrom to plaintiffs and the amount of excess costs incurred in the performance of the contract are shown by plaintiffs, as to shifting the burden of proof to defendant "to fix more precisely the amount of damages" from its wrongful conduct, see *Matarese* v. *Moore-McCormack Lines*, 2 Cir. 158 F. 2d 631, 636-637; *Gotham Silk Hosiery Co.* v. *Artcraft Silk Hosiery Mills*, 2 Cir., 147 F. 2d, 209, 215.

The time honored applicable rule is thus stated in *Wakeman* v. *Wheeler & W. Mfg. Co.* (1886). 101 N. Y. 205, 209; 4 N. E. 264, 266:

> "But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any dam-

age whatsoever for the breach. A person violating his contract should not be permitted to escape liability because the amount of damages he has caused is uncertain."

The denial of recovery in the instant case solely on the ground of uncertainty in the amount of damages for the injury from two repeated breaches of contract, recognized in the Court's opinion, although the proof contained a clear and reasonable basis for figuring the approximate dollar amount, presents a question of such importance as to warrant, by itself, review and reversal.

Conclusion

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted as prayed for.

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SIMON MICHELET,
WM. J. HOGAN, JR.,
Of Counsel.

October 3, 1947.

APPENDIX I

Act of Congress of July 23, 1937, c. 520, 50 Stat. 533, 28 U. S. C. Sec. 250(b) in Supp.

Jurisdiction is conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, by reason of the Government having promulgated and enforced, as alleged, due, as alleged, to the national emergency and subsequent to the dates of the several contracts, rules and regulations referred to in the several contracts and misinterpreted and wrongfully enforced or disregarded, as alleged, and rules and regulations not referred to in and inconsistent with the respective contracts, as alleged, which rules and regulations, the enforcement or disregard thereof, deprived the contractors of normal control of their personnel, as alleged, and further by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; the said judgment or decrees, if any, to be allowed notwithstanding the bars or defenses of any alleged settlement or adjustment made prior to July 23, 1937, res adjudicata, laches, or any provision of law to the contrary.

This section shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

Review of such judgment may be had by either party in the same manner as is provided by law in other cases in such court.

APPENDIX II

Act of Congress of February 13, 1925, c. 229, Sec. 3, 43 Stat. 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, 28 U. S. C. Sec. 288 and Supp.

(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue.